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IN THE

# Supreme Court of the United States

OCTOBER TERM 1948

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No.————————

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TURNER COUNTY, SOUTH DAKOTA

*Petitioner*

vs.

FLOYD MILLER

*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Turner County, South Dakota, respectfully shows:

### I.

**Summary and Statement of the Matter Involved.**

This is an action at law brought in the District Court of the United States for the District of South Dakota on the ground of diversity of citizenship for personal injuries claimed to have resulted from the collapse of a bridge on petitioner's county highway system. The case was submitted to a jury on the theory that a defective hanger plate caused the bridge to be out of repair to such an extent as to endanger the safety of public travel and the board of County Commissioners had notice of such condition more than twenty-four hours before the accident and failed to erect guards in accordance with the South Dakota statute SDC 28.0913, resulting in verdict for plaintiff for $54,477.00 and judgment thereon.

An appeal was taken from such judgment by petitioner to the United States Court of Appeals for the Eighth Circuit which was based generally upon the grounds that the trial court by various rulings and instructions imposed liability greater than the applicable statute permits as the same is construed by decisions of the South Dakota Supreme Court; that by various rulings and statements petitioner was not afforded a fair trial; and that verdict should have been directed for petitioner. The judgment of the trial court was affirmed and petition for rehearing denied in the Court of Appeals.

## II.

### Basis for Jurisdiction

It is contended that this Court has jurisdiction to review such judgment of the United States Court of Appeals for the Eighth Circuit by virtue of Title 28, United States Code, § 1254 (1) and Rule 38, Revised Rules of the Supreme Court of the United States, par. 5 (b) in that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions and has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the lower court as to call for an exercise of the Supreme Court's power of supervision. The date of the decision sought to be reviewed is December 2, 1948, and the date of the order denying the petition of the appellant there and petitioner here for a re-hearing in the Court of Appeals is December 27, 1948.

It is believed that the nature of the case as stated in the preceding summary statement and the rulings of the Court as outlined in the subdivisions following are such as to bring the case within the jurisdictional provisions relied on. The cases believed to sustain the jurisdiction are as follows:

Alford vs. U. S., 282 U. S. 687, 51 Sup. Ct. 218

Bailey vs. Lawrence County, 5 S. D. 393, 59 N. W. 219

Berger vs. U. S., 295 U. S. 78, 55 Sup. Ct. 629

District of Columbia vs. Clawans, 300 U. S. 617, 57 Sup. Ct. 660

New York Central Railway Company vs. Johnson, 279 U. S. 310, 49 Sup. Ct. 300

Reaney vs. Union County, 69 S. D. 392, 10 N. W. 2d 762

Williams vs. Wessington Township, 70 S. D. 75, 14 N. W. 2d 493

These cases are identified as to the questions which they involve in the next division of this petition.

## III.

### Questions Presented

1. Whether the Circuit Court of Appeals erred in holding under the applicable South Dakota statute, SDC 28.0913, set out in the appendix, that actual notice to the County Commissioners was not necessary and that constructive notice could be imputed through the County Highway Superintendent. Petitioner contends that this decision is in conflict with Williams vs. Wessington Township, 70 S. D., 75, 14 N. W. 2d 493 and Reaney vs. Union County, 69 S. D. 392, 10 N. W. 2d 762, the applicable local decisions construing the statute.

2. Whether the Court of Appeals erred in holding that a duty of inspection and maintenance could be shown as bearing on constructive notice. Petitioner contends that such decision is in conflict with the applicable local decisions, Bailey vs. Lawrence County, 5 S. D. 393, 59 N. W. 219, Reaney vs. Union County, 69 S. D. 393, 10 N. W. 2d 762.

3. Whether the Circuit Court of Appeals erred in holding that petitioner was afforded a fair trial despite restriction of its cross examination of respondent and his witnesses, other rulings and comments of the trial court and improper argument by respondent's counsel. Petitioner contends that the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the lower court, contrary to the principles announced in Alford vs. U. S., 282 U. S. 687, 51 Sup. Ct. 218; District of Columbia vs. Clawans, 300 U. S. 617, 57 Sup. Ct. 660; New York Central Railway Company vs. Johnson, 279 U. S. 310, 49 Sup. Ct. 300 and Berger vs. U. S., 295 U. S. 78, 55 Sup. Ct. 629 as to call for an exercise of the Supreme Court's power of supervision.

4. Whether the Court of Appeals erred in its decision that petitioner was not entitled to a directed verdict on its claim that respondent's evidence is opposed to the undisputed physical facts. Petitioner contends that its decision in that respect so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the lower court as to call for an exercise of the Supreme Court's power of supervision.

## IV.

### Reasons Relied on for the Allowance of the Writ

These reasons will be more specifically discussed in petitioner's supporting brief hereto annexed to which reference is made as a part of this sub-division of this petition.

Generally, however, the reasons relied on are these:

1. The questions of local law involved are important ones. They involve the extent of duty and liability under the applicable statute on the part of every county and township in the state as to the highways, culverts and bridges under their respective jurisdictions. These questions are likewise of importance in defining the rights of the citizens of the state and of other states in traversing these highways and potentially affect the great volume of traffic over them which is involved. The rights and liabilities of cities under utility franchises were considered of sufficient importance to grant certiorari in City of Texarkana vs. Arkansas, Louisiana Gas Co., 306 U. S. 188, 620, 59 S. Ct. 94, 448. It is submitted that the rights and liabilities of counties and townships arising from the use of highways are of equal or greater importance. Petitioner contends that the Court of Appeals decided these important questions of local law in a way in conflict with the local decisions mentioned in the Questions Presented.

2. By limitation of cross examination, by persistent adverse rulings of the trial court giving an appearance of hostility to petitioner and by improper argument of counsel, petitioner was deprived of a fair trial and was refused the directed verdict to which it was entitled, contrary to the principles announced in the decisions mentioned in the Questions Presented and contrary to the accepted and usual

course of judicial proceedings recognized in other decisions of the Court of Appeals.

WHEREFORE, your petitioner respectfully prays that an order be entered granting this application for Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in the case numbered and entitled on its docket No. 13,727, Turner County, South Dakota, a body corporate, Appellant, vs. Floyd Miller, Appellee, and that the judgment be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

T. M. BAILEY,
M. T. WOODS,
H. L. FULLER,
Sioux Falls, South Dakota.

L. L. MADSEN,
Parker, South Dakota,
*Counsel for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM 1948

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No.————————

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TURNER COUNTY, SOUTH DAKOTA

*Petitioner*

vs.

FLOYD MILLER

*Respondent*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I.

### Opinion of Court Below

The opinion in the Circuit Court of Appeals is reported in 170 F. 2d at page 820 (Full citation: "Turner County, South Dakota, a body corporate, vs. Floyd Miller, 8 Cir., 170 F. 2d 820).

### II.

### Grounds on Which Jurisdiction Is Invoked

Jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 and Rule 38, Revised Rules of the Supreme Court of the United States, par. 5 (b) in that it is contended that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions and has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the lower court as to call for an exercise of the Supreme Court's power of supervision.

## III.

### Statement of the Case

This was a suit for damages for serious personal injuries resulting from the collision of plaintiff's automobile with some part of the bridge in question or abutment thereto. The bridge was a part of petitioner's county highway system on an east-west gravelled highway. The bridge is a steel truss type (R.128). Two slant chords or end posts on each side of the bridge at either end rest on piers supporting girders or chords across the top. The weight is born by the slant chords through the chord across the top with the slant chords at opposite ends on each side tied together by a series of eye-bars extending horizontally from the base of one slant chord to the base of the other which keeps the slant chords from spreading (R.208). Crosswise of the bridge steel I-beams or floor beams are suspended by hanger plates attached to the verticle members of the truss. They don't support the bridge but the truss portion supports them (R.208).

On these beams the wooden floor is constructed consisting first of stringers or joists of 3 x 12 planks 18 feet long laid on edge lengthwise from one floor beam to the next. They meet the next series of stringers on top of each floor beam where they are lapped and nailed together with large spikes (R.16-18, 171, 332). The actual floor of the bridge on which vehicles travel consisted of 3 x 12 planks crosswise of the bridge resting on and nailed with large spikes into the stringers or joists (R.123, 171, 332). Each panel of flooring from floor beam to floor beam consisted of the 14 stringers or joists and of the flooring nailed across the top of them with the ends of the stringers resting on the floor beams and joined to the next panel of flooring by overlapping of the stringers, nailed together through the overlapping and nailed together through the floor boards on top of the 18 inch lap where they join the next series of stringers (R.16, 171, 177, 279).

The failure of a hanger plate suspended below the truss would not take down the whole bridge (R.125). It would permit the floor beam to drop and would remove the support which the floor beam had afforded to the stringers and decks

of the two adjacent floor panels (R. 110). Then whether the floor would drop would depend on whether the stringers nailed together continued to hold (R.220).

There were five of these floor beams which have for convenience been referred to numerically commencing at the east beam which is referred to as Point "1." The next hanger plate to the west of it is referred to as Point "2" and succeeding plates to the west are referred to as "3," "4" and "5" (R.15).

On March 3, 1946, shortly after midnight plaintiff proceeded east on this highway and onto the bridge and had no trouble as he went onto the bridge. When he was about half way over the bridge it felt to him like the floor went out from under him and tipped to the south which was followed in less than a second by a big bump which threw the steering wheel out of his hand and that was the last he remembered (R.39). His car eventually stopped crosswise of the highway facing north against the north abutment at the east approach to the bridge with the south abutment knocked down (R.285, 295, 299).

Plaintiff was followed by his brother in another car about 100 to 150 feet behind him. As the brother drove on the bridge the floor looked all right to him. When he was a little over half or two thirds of the way across he started going down with the bridge and observed that something was wrong with it, that it was broken down and the floor was not in normal position and when he woke up to see what he was doing he was hanging with his car crosswise over the south side of the bridge about at the first I-beam west of the piers, referred to as Point 1 (R.62-5).

Following the accident the first section or panel of flooring which had extended from the east piers to the floor beam at Point 1 was slanting down toward the water with the second car which had been driven by the brother hanging over the south edge of this flooring with the vertical rods from which had suspended the hanger plate at Point 1 wrapped over the windshield and top. The wood floor which had extended from Point 1 to Point 3 through Point 2 was level about 4 to 6 inches above the water and from Point 3 the floor slanted in a straight plane up toward the west to the west piers (R.285, 299, 169, 283).

After the collapse of the bridge it was found that the hanger plate which supported the south end of the I-beam at Point 2 was broken (R. 21, 305, 307). Plaintiff's experts expressed the opinion that the hanger plate broke because of metal fatigue resulting in a progressive failure over a period of years which could not have occurred without a visible crack in the hanger plate (R. 103-9, 113-16) and that this would allow the floor panel between Points 1 and 3 to drop in some sort of a V-shape so that the car would go into the dip and it would be the same as hitting any sort of dip with an automobile (R. 121).

Petitioner contends that the bridge could not have collapsed in that fashion and some of the evidence dealing more particularly with that contention will be discussed in the appropriate division of the argument to follow.

The county commissioners had no actual knowledge that anything was wrong with the bridge (R. 157, 164, 167-8, 175). No issue was submitted of the existence of an obviously dangerous condition for a sufficient period of time to impute constructive notice to the commissioners (R. 246-59). The issue of notice was submitted to the jury solely on the basis that if the county highway superintendent knew or should have known that the bridge was in an unsafe condition his knowledge would be imputed to the county and the commissioners would be deemed to have notice (R. 251-2). Petitioner contends that this was in conflict with the applicable local decisions which will be discussed.

Evidence was received as to inspections and the necessity of inspections by the county highway superintendent (R. 9-10, 22-3, 30, 117, 118-19) and instructions were given that petitioner was considered to have knowledge or notice of everything that the superintendent observed or should have observed and if by reasonable inspection he should have discovered the condition, plaintiff was entitled to recover (R. 252-3, exceptions at 262-3). As to this petitioner contends that a duty of inspection and maintenance was imposed on the county contrary to the applicable local decisions to be discussed.

Various rulings and occurrences which petitioner contends

deprived it of a fair trial will for convenience be outlined in the appropriate division of the argument rather than here.

## IV.

### Specification of Errors

1. The Court of Appeals erred in holding and deciding under the applicable South Dakota statute SDC 28.0913 that actual notice to the county commissioners was not necessary and that constructive notice could be imputed through the county highway superintendent.

2. The Court of Appeals erred in holding that a duty of inspection and maintenance and evidence of inspections could be shown as bearing on constructive notice.

3. The Court of Appeals erred in holding that petitioner was afforded a fair trial despite restriction of its cross examination of respondent and his witnesses, other rulings and comments of the trial court and improper argument by respondent's counsel.

4. The Court of Appeals erred in holding that petitioner was not entitled to a directed verdict on the premise that respondent's evidence is opposed to the undisputed physical facts.

## V.

## Argument

### Summary

Point 1. Actual notice to the commissioners was required under the applicable statute and local decisions.

Point 2. In matters of inspection and maintenance a greater liability was imposed than the applicable statute and local decisions permit.

Point 3. Restriction of cross examinaton, other rulings and comments and improper argument deprived petitioner of a fair trial.

Point 4. Respondent may not recover on evidence contrary to the physical facts.

### Point 1.

### Actual Notice to the Commissioners Was Required Under the Applicable Statute and Local Decisions

The Circuit Court of Appeals held that actual notice to the board of county commissioners was not required and that opinion evidence of the existence of a patent defect for a period of several years which in the exercise of due care should have been discovered by the county board through its superintendent of highways was sufficient to take the case to the jury on the question of notice (R. 422).

For convenience we quote the applicable statute SDC 28.0913, which is also set forth in the appendix, as follows:

> "28.0913 *Defective highways, bridges, culverts: duty of county, township, or municipality to guard and repair; action for damages by person injured.* In case any highway, culvert, or bridge shall become in whole or in part destroyed or out of repair by reason of floods, fires, or other cause to such an extent as to endanger the safety of public travel, it shall be the duty of the governing body or board under statutory duty to maintain such highway, culvert, or bridge upon receiving notice thereof to cause to be erected for the protection of travel and public safety, within twenty-four hours thereafter, sub-

stantial guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and to repair the same within a reasonable time thereafter. It shall also be the duty of such governing body or board to guard any abandoned public highway, culvert, or bridge in like manner.

"Any person who shall sustain injury to person or property by reason of any violation of this section shall have a cause of action against the county, township, city, or town as the case may be for such damages as he may have sustained."

As distinguished from municipal corporations a county is not liable for injuries caused by a defective highway or bridge in the absence of statute. Vesely vs. Charles Mix County, 66 S. D. 570, 287 N. W. 51; Williams vs. Wessington Township, 70 S. D. 75, 14 N. W. 2d 493. As the South Dakota court points out in Williams vs. Wessington Township:

"Counties and townships, being quasi corporations, are not liable in the absence of statute imposing liability for injuries caused by defective highways. Robinson vs. Minnehaha County, 65 S. D. 628, 277 N. W. 324. The reason assigned for the rule of non-liability at common law is that counties and townships are political subdivisions of the state exercising a part of the sovereign powers of the state and liable only to the extent the state itself would be in the absence of statute imposing liability. Bailey vs. Lawrence County, 5 S. D. 393, 59 N. W. 219, 49 Am. St. Rep. 881. A distinction in this respect is recognized between quasi corporations and municipal corporations. The general rule is that cities and towns are liable for injuries sustained in consequence of their failure to use due care to keep their streets in a reasonably safe condition for public travel. Norberg vs. Hagna, 46 S. D. 568, 195 N. W. 438, 29 A. L. R. 841; Jensen vs. Juul, 66 S. D. 1, 278 N. W. 6, 115 A. L. R. 1280."

The South Dakota cases on notice are Clementson vs Union County, 63 S. D. 104, 256 N. W. 794 and Williams vs. Wessington Township, supra.

In the Clementson case, decided in 1934, the Court held that constructive notice was sufficient as follows:

> "This court has consistently held that independent of statute notice to the governing body of a municipality of a defective condition of a sidewalk is necessary before liability attaches to the municipality for the defect, yet implied or constructive notice has always been held sufficient to meet this requirement of notice. Smith vs. City of Yankton, 23 S. D. 352, 121 N. W. 848; Gellenbeck vs. City of Mobridge, 40 S. D. 157, 166 N. W. 631; Schuler vs. City of Mobridge, 44 S. D. 488, 184 N. W. 281. The plaintiff did show that the highway on which the accident occurred was one of the main traveled roads in Union county, and that the washout or gully had been in existence for a period of six weeks preceding the accident, and this is sufficient to warrant a jury in finding that the county commissioners had implied or constructive notice of the defective highway, which in our opinion is sufficient upon which to base the verdict."

In the Clementson case it will be observed the court applies the rules of liability of municipal corporations. Petitioner submits that this rule has been qualified by Williams vs. Wessington Township, decided in 1944. The quotation from the Wessington case mentioned above shows that the liability of the county is to be distinguished from the liability of municipal corporations. There an instruction was given that guards must be erected by the board within a reasonable time not more than 24 hours after having notice of the defect. As to that, the court says:

> "The argument in support of the instruction is that the statute has brought within the operation of the law of negligence a class of cases not heretofore actionable, and that the general principles of negligence are applicable in the absence of a statutory provision to the contrary. As a general rule, in order to render a *municipal corporation* liable under the common law for injuries resulting from a defective condition in a street or sidewalk, which it has not itself created or authorized, it must have had knowledge or notice thereof a sufficient length of time before an injury to afford a reasonable

opportunity to remedy the condition or to take other precaution to guard against injury. Smith vs. City of Yankton, 23 S. D. 352, 121 N. W. 848; Schuler vs. City of Mobridge, 44 S. D. 488, 184 N. W. 281; Clementson vs. Union County, 63 S. D. 104, 256 N. W. 794. There is in *such instances* no fixed or definite rule as to what length of time a defect must have existed to furnish notice. Much depends upon the character of the defect and upon the circumstances and surroundings. It is contended in the present case that the statute has limited to twenty-four hours this rule of reasonable notice.

"We are unable to concur in this construction of the statute. The liability is statutory and townships are liable for damages caused by defective highways, culverts or bridges to the extent only that they are made so by statute. There is no common law liability for negligence in this connection. The statute creates the right of action against townships and does not merely modify an existing right. Liability attaches under the statute only when the township board has had notice of the defect at least twenty-four hours prior to the time of injury. Cf. Brady vs. City of Lowell, 3 Cush., Mass., 121; Wagner vs. Board of Com'rs, 103 Kan. 719, 176 P. 140, 665; Hurley vs. Bowdoinham, 88 Me. 293, 34 A. 72; Allen vs. Cook, 21 R. I. 525, 45 A. 148. The instruction given permitted the jury to hold defendant township liable without proof of such notice." (Italics supplied.)

While the Court was specifically considering the 24-hour provision in the statute, the effect of the decision as to the character of notice now required is clear. After pointing out that the liability of a township or county differs from that of a municipal corporation the Court discusses the character of notice to and liability of municipal corporations and the statement "There is in such instances no fixed or definite rule" is obviously referring to and comparing the rule of liability in the case of a municipal corporation as distinguished from a township or county. The Court points out in the second quoted paragraph that in the case of a township (where liability is the same as a county) this rule does not apply. The liability is strictly statutory and the cases which

the Court now cites as distinguished from the Michigan and Iowa cases mentioned in the Clementson decision are among others the Kansas and Maine cases requiring actual notice. The principles which formed the basis for the Court's decision can be determined by examination of the Kansas and Maine cases which it cited with approval.

In Wagner vs. Board of Commissioners, 103 Kan. 719, 176 P., 140, 665 it appeared that the statute required that "the chairman of the Board of County Commissioners of such county shall have had notice of such defects for at least five days prior to the time when such damage was sustained." The Court says:

> "Notice to *the individual specified,* for the specified length of time, is a condition precedent to liability, and to hold otherwise would be, not to interpret, but to emasculate the statute. In this instance the knowledge and participation of the chairman of the board was limited to contracting for the improvement. He had no notice in fact of the defect, and there must be notice to him or the county is not liable. Assuming that the workmen who installed the culvert should be held to notice of the defective condition of the highway arising from their negligence, they are not the persons designated in the statute; and the only means by which the statutory condition to liability might possibly be fulfilled would be to bind the chairman by imputed or implied or constructive notice. Under the uniform decisions of this court for so long a time that presumably the legislature has accepted them as correctly reflecting its intention, this cannot be done. * * * 'This statute excludes the idea of imputable or constructive notice. The case is unlike those cited by counsel for the plaintiff in error, in which the municipality is liable upon notice to its governing authorities in their corporate capacity.' " (Italics supplied.)

In Hurley vs. Bowdoinham, 88 Me. 293, 34 A. 72 the statute by its terms required actual notice which is construed by the Court as follows:

> "And the notice must be of the defect itself—of the identical defect which caused the injury. Notice of an-

other defect, or of the existence of a cause likely to produce a defect, is not sufficient."

While the Kansas statute requires notice to a particular person and the South Dakota statute requires notice to a governing board, the principle is the same. Actual notice must be received by the individual or individuals specified.

Further the most that the Clementson case holds is that the existence of the defect for a period of six weeks was sufficient to warrant a jury in finding that the commissioners had implied or constructive notice. In this case, that issue was not submitted to the jury (R. 246-59). The issue of notice submitted was that what the county superintendent knew or should have known is to be imputed to the commissioners and county (R. 251-2).

In the face of the strict rule of liability only under the statute established in Williams vs. Wessington Township, supra, and the terms of the statute itself requiring notice to the governing body and with no provision for notice to a county highway superintendent or any other county employee or officer, petitioner submits that the decision of the Court of Appeals is judicial legislation which emasculates the statute and is in conflict with the applicable local decisions.

Further as will be discussed in the next point, this construction of the statute can have no effect but to broaden the liability of the county to the ordinary common law liability of a municipal corporation to maintain bridges and highways in a reasonably safe condition for public travel.

## Point 2.

### In Matters of Inspection and Maintenance a Greater Liability was Imposed Than the Applicable Statute and Local Decisions Permit

In the course of the trial reference was first made in respondent's opening statement to a duty to keep the bridge safe and the necessity of inspection and thereafter evidence of these inspections and the necessity therefor was admitted over defendant's repeated objection (R. 9-10, 22-3, 30, 117, 118-19). Instructions were given, referred to also under the previous point, to the effect that the county was charged with everything the superintendent observed or should have observed in the course of his inspection and if by reasonable

inspection he should have discovered a defective condition in the bridge more than 24 hours before the accident, plaintiff could recover (R. 252-3, exceptions at 262-3 and 265). And the Court refused instructions to the effect that the county was not charged with the duty to keep the bridge in a safe condition and was not liable for acts or omissions of the superintendent in inspections (R. 265-6, 271). The Court of Appeals held that evidence as to the necessity of frequent inspections was admissable as bearing on constructive notice, since if it were not shown that inspections were necessary the county board could not be charged with constructive notice. (R. 427.)

In order to better explain the applicable local decisions we shall first refer briefly to the various statutory provisions relating to the question. They are set out in full in the appendix.

Chapter 28, SDC, deals with the county highway system and Sections 28.0304 and 28.0312 charge the county commissioners with the duty to maintain the county highway system and the superintendent with the duty to maintain subject to the approval of the board and with the actual direction and supervision of maintenance work.

The applicable statute as to liability, 28.0913, which was quoted in the preceding point and is set forth in the appendix is contained in a chapter on general regulations as to highways and provides in substance that the governing board shall erect guards within 24 hours after notice that a bridge or highway has become in part destroyed or out of repair.

Chapter 28.14, SDC, deals with bridges and culverts. Section 28.1402 from that chapter imposes upon the board of county commissioners a duty to construct and maintain bridges in the county highway system; Section 28.1412 requires the board to build and maintain guard rails and Section 28.1414 requires the superintendent at reasonable intervals to make a thorough inspection of each bridge in the county. These sections are likewise set forth in the appendix.

The question of liability first arose prior to the adoption of a statute such as SDC 28.0913 specifically imposing liability, although there was even then a statute such as the foregoing, requiring the counties to keep bridges in repair.

See Bailey vs. Lawrence County, 5 S. D. 393, 59 N. W. 219 which has been cited throughout subsequent South Dakota decisions on the question, as follows:

> "While in this state, counties are made corporations for civil and political purposes only, they are corporations with comparatively limited powers; and while it is true that *the legislature has imposed upon counties the duty of keeping in repair* the bridges on the public highways, and provided the method for raising revenue by taxation requisite for such purpose, yet to hold that the counties are thereby made liable for injuries caused by defects in such bridges, in the absence of legislation making them so liable, would be a species of judicial legislation." (Italics supplied.)

In its most recent decision, Pederson vs. Canton Township, (S. D.) 34 N. W. 2d 172, dealing with an abandoned highway as distinguished from one which is damaged or out of repair the same principle is announced:

> "A township in the construction and maintenance of highways acts in a governmental capacity and its liability is limited to that imposed by statute. Williams vs. Wessington Township, 70 S. D. 75, 14 N. W. 2d 493. The question is not whether the township board exercised ordinary care in protecting public travel at the intersection; liability arises from failure to guard an 'abandoned public highway, culvert, or bridge.'"

In the next recent decision on the question dealing with our present statutes, Reaney vs. Union County, 69 S. D. 392, 10 N. W. 2d 762, it is held that there is no liability for failure to maintain a safe bridge. The Court traces some of the history of the liability statute SDC 28.0913 which was formerly § 8589 and says:

> "It will be observed that the revision omits the provision of § 8589, supra, charging the county with the duty 'to keep the public highways, culverts and bridges in such condition as to render them safe, passable and free from danger of accident or injury to persons or property while in the lawful use thereof'; and retains the provisions charging it with the duty to guard and

> repair highways which become in whole or in part destroyed or out of repair by reason of floods, fires, or other causes, and with the duty to guard abandoned highways. * * * The broad general duty to maintain a reasonably safe highway has been eliminated, and the specific duty to guard and repair a damaged or destroyed highway has been retained. To read the more extensive duty, out of language which clearly and plainly but describes the lesser duty, would be to distort the words employed by the Legislature. * * * For the purposes of this opinion it may be assumed that the county had been derelict in its duties, viz., that it had failed to install adequate signs of the danger incident to a sharp curve leading immediately to a narrow approach to a bridge; and that the guard rail of the approach was not as substantial as the statute contemplates. SDC 28.1412. However, these derelictions on the part of the county cannot, by legitimate construction, be brought within the embrace of the language of SDC 28.0913."

While the decision does not specifically discuss the duty to inspect that is certainly implied in the duty to maintain which has been eliminated as a basis for liability. It is specifically held that the county is not liable for a breach of its statutory duty to erect guard rails as required by SDC 28.1412. In the same chapter in which that section is found the statutory duty is imposed on the highway superintendent to make inspections by SDC 28.1414 and the duty is imposed on the commissioners to construct and maintain the bridges and culverts by SDC 28.1402. These sections and those mentioned above from the chapter dealing with the county highway system, SDC 28.03, are but companion provisions to the section specifically considered, namely SDC 28.1412, upon which liability cannot be predicated.

If as this decision specifically holds, there is no liability because of the county's failure to comply with the statutory duty to maintain bridges and highways and *to erect guard rails*, there can likewise be no liability for a failure to comply with the companion statute requiring the superintendent to inspect.

In this state of the law as determined by the applicable local decisions we consider the effect of the ruling of the trial court and the Court of Appeals, permitting respondent to show the evidence of duty to inspect and imposing liability for what the superintendent may have failed to observe. It can have but one effect and that is to make the county liable for a failure to maintain contrary to the specific holding of the Reaney case. This can be best illustrated by assuming that there was liability for a failure to maintain. Plaintiff's proof would be precisely what it is here, a showing that periodic inspections by the superintendent were necessary in order to determine the steps necessary for proper maintenance to keep a safe bridge and that he failed to make the inspections or failed to observe what he should have in making them. The liability then becomes a liability for failure to go out and discover any defects in the bridge, which is simply performance of the broad general duty to maintain a reasonably safe highway as distinguished from the specific duty to guard and repair a damaged or destroyed highway after notice is brought to the commissioners.

If that is the rule, the county for all practical purposes becomes liable for failure to *keep in repair* contrary to the Bailey case and breach of a duty to *maintain a reasonably safe highway* contrary to the Reaney case and becomes liable to the same extent as "cities and towns are liable for injuries sustained in consequence of their failure to use due care to keep their streets in reasonably safe condition for public travel" as distinguished in Williams vs. Wessington Township, supra.

And further in such a case as this, liability depends entirely upon the character of the inspection made by the highway superintendent. If he fails to properly inspect, regardless of how his conduct may be characterized as bearing upon constructive notice to be imputed to the commissioners or otherwise, it is still simply negligence for which the county is being held liable; and "there is no common law liability for negligence in this connection" Williams vs. Wessington Township, supra.

## Point 3.

**Restriction of Cross Examination, Other Rulings and Comments and Improper Argument Deprived Petitioner of a Fair Trial**

**(A) Cross Examination and Other Rulings and Comments**

As a background for discussion of this point the evidence showed that respondent's right arm was amputated leaving a stub of three or four inches and the nerve into his left arm was seriously damaged so it was almost completely no good (R. 145-7). He was not able to feed himself, to use his hands to smoke or to attend to the elementary needs such as toilet himself (R. 42, 153). There was naturally a substantial appeal to sympathy, pity and prejudice in plaintiff's physical circumstances.

As to petitioner's contention that it was deprived of a fair trial by persistent rulings which gave appearance of lack of substance on the part of the defense and indicated to the jury that the Court was of the opinion that plaintiff ought to prevail, the Court of Appeals recognized that "some of them are subject to criticism" but that none of them even if erroneous arose to the dignity of prejudicial error (R. ). Included in these rulings were a number which limited petitioner's cross examination of respondent and his witnesses. As to these the Court of Appeals held that no error justifying a reversal was committed although recognizing that "the trial court might well have adopted a more liberal attitude toward the cross examination of the plaintiff and his witnesses relative to discrepancies between their testimony at the trial and their previous accounts of the accident." (R. 430.)

Petitioner contends that cross examination on a proper subject is a matter of right and to refuse it is a departure from the accepted and usual course of judicial proceedings contrary to the principles which have been announced by this Court in Alford vs. United States, 282 U. S. 687, 51 S. Ct. 218, as follows:

> "Cross examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271, 18 L. Ed. 165. * * * The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial Court. It may exercise a reasonable judgment

in determining when the subject is exhausted. * * * The trial Court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error."

The rule is more recently recognized in District of Columbia vs. Clawans, 300 U. S. 617, 57 S. Ct. 660, as follows:

"We do not stop to give other examples of the summary curtailment of all inquiry as to matters which are the appropriate subject of cross examination.

"The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions having a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error. See Alford vs. United States, supra."

The rulings complained of will be briefly summarized as follows:

Prior to his own testimony respondent had developed from the highway superintendent that tire marks were visible on the floor of the bridge after its collapse and he could not see if the marks were close enough to either side of the bridge so that a car would have struck (R. 18). On cross examination respondent testified that he didn't know if his brakes were applied on the bridge and that he didn't have occasion to apply them. He was then asked whether there would be any skid marks from his wheels on the bridge to which objection was sustained with the trial court's comment that it was a good deal speculative and a car frequently skids when there isn't any brakes on it (R. 46).

In the course of his cross examination respondent testified he could see his brother's lights in the windshield and

that his brother was about 100 feet from him. Petitioner attempted to interrogate him as to the answer on previous examination in which he stated the distance was 50 to 75 feet to which objection was sustained (R. 47).

On direct examination respondent had testified that he felt the sensation of the floor giving out from under him and tipping toward the south and the next thing he remembered was a big bump, a hard bump, like the spring hit the axle (R. 39). Petitioner then attempted to interrogate him as to his previous deposition testimony to the effect that he felt a little sway and then the drop when the car hit the abutment. Objection was sustained despite petitioner's contention that nothing was stated about the bump on this previous occasion although there was adequate opportunity to state the full occurrence. And this was with the Court's comment (diametrically opposed to the witness' testimony on direct examination) to the effect that he hadn't said anything about hitting a bump (R. 47-8).

Again on direct examination he testified that he felt the bump which jarred the car and a twist in the steering wheel and he lost hold on the steering wheel and that is the last that he remembered (R. 39). Petitioner attempted to interrogate him as to his previous testimony that the last thing he remembered was when he hit the planks on the end of the bridge that connected it with the road and that he remembered that his car got to that point. Prior to this ruling his counsel developed that at the time he was not able to see what he hit and did not know then or at the time of trial what it was. Objection to petitioner's cross examination was sustained with the Court's comment emphasizing and confirming the testimony of the witness to the effect that he didn't know then and doesn't know now just what caused the jar, that he "had not stated he remembered something then that he doesn't remember now" and that the statement was "not contradictory" (R. 48-50). Respondent had in fact said he remembered something then when he said he remembered he hit the planks.

On direct examination respondent's brother Willard who had been following respondent's car testified that as respondent's car entered the bridge he did not see anything out of

the way in its movement, that it was not moving from side to side but while it was crossing the bridge about two-thirds of the way across it took a big jump and then flew from side to side after that (R. 63). On cross examination he was asked whether he had seen his brother's car swirling like it was on ice while it was on the bridge and he said "No." Inquiry was then made as to his previous statement to the effect that it was going like a car on ice to which objection was sustained with the Court's comment that it didn't appear to be contradictory to statements made at the time of the trial (R. 68). Interrogation on that was later permitted by qualification of plaintiff's objection (R. 69).

Willard then testified on cross examination that the floor did not look flat ahead of him as though he could have driven right across at all times up to the time that his car went into the side of the bridge. Petitioner attempted to interrogate on previous testimony that to all appearances the floor looked flat ahead and he could have driven right across, to which objection was sustained as not being contradictory (R. 69).

On further cross examination Willard testified that the southeast corner of the bridge was loose after the accident and that it was loose when he was two-thirds of the way across and it went down. Petitioner then attempted to interrogate him as to his previous statement that he saw the corner of the bridge hanging down and figured it was when he entered the bridge. Objection was again sustained with the comment that "figure it was" was not the equivalent of saying that he could see it.

These matters were not merely collateral matters but went to the very essence of respondent's contention that the bridge dropped when his car was at the floor beam at Point 2 and petitioner should have been allowed the fullest and freest examination on that important subject to develop even the slightest variation and inconsistency in the statements and testimony of the witnesses at different times.

It cannot be seriously doubted that previous inconsistent or contradictory statements are proper subjects of inquiry. 70 C. J. 1011. In each instance the Court prevented inquiry into the particular inconsistent or contradictory statement

involved and each was a *subject* on which cross examination was a matter of right. In fact, by its decision on these matters the Court of Appeals is departing from its own accepted and usual course of judicial proceedings recognized particularly in Kroger Grocery & Baking Co. vs. Stewart, 8 Cir., 164 F. 2d 841 where cross examination was limited as to inconsistent statements and the Court says:

> " 'It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.' Alford vs. United States, 282 U. S. 687, 692, 51 S. Ct. 218, 219, 75 L. Ed. 624. To cut off all inquiry on a subject with respect to which the defense was entitled to make reasonable inquiry is an abuse of discretion and prejudicial error. A trial court is under no obligation to protect a witness from being discredited on cross-examination, 'short of an attempted invasion of his constitutional protection from self incrimination, properly invoked.' Id., at page 694 of 282 U. S., at page 220 of 51 S. Ct., 75 L. Ed. 624. Moreover, a greater latitude is allowable in the cross-examination of a party who takes the witness stand than with respect to other witnesses. Rea vs. Missouri, 17 Wall 532, 542, 84 U. S. 532, 542, 21 L. Ed. 707. See, also, and compare, Toplitz vs. Hedden, 146 U. S. 252, 254, 13 S. Ct. 70, 36 L. Ed. 961; Kunglig Jarnvagsstyrelsen vs. Dexter & Carpenter, 2 Cir., 32 F. 2d 195, 197, 198; Stolte vs. Larkin, 8 Cir., 110 F. 2d 226, 231, 233."

The denial of full and complete cross-examination on these important matters was particularly prejudicial when coupled with the Court's comments which could have no other effect than to lead the jury to believe that there was no inconsistency in the statements of respondent and his witnesses when in fact there was.

On cross-examination respondent's expert witness McWayne testified he was of the opinion the hanger plate broke

before the bridge fell but stated he would not say that for certain (R. 138). On re-direct he was asked whether the circumstances left any doubt in his mind about it and petitioner's objection that he had stated he was not certain and was being cross-examined into saying something different was overruled. The complaint of respondent's counsel that the witness was misquoted by petitioner's counsel was impliedly confirmed by the Court's comment that respondent's counsel had correctly quoted the witness (R. 139).

On cross examination respondent's expert McWayne testified that his opinion was based on the photographs. He looked at parts of the bridge at Hassenstein Steel Company but it was hard to tell what was there and what wasn't. He admitted telling Hassenstein it would be impossible to determine the cause of the bridge going down from the evidence that was in the yard (R. 138). He was then asked whether the I-beam was one of the damaged parts in the yard to which objection was sustained with the comment there was not anything to indicate whether the I-beam was one of the parts there or not (R. 140). Petitioner submits that obviously this question was intended to determine just what his knowledge was and what his examination was of the parts which formed a foundation for his opinion on the ultimate issue in the case. If the I-beam with the fractured hanger plate in fact was there, his testimony was discarded by his admission to Hassenstein.

On direct examination of petitioner's expert Giertsen he testified that the weakest point in the bridge was the hip hanger consisting of two round steel rods at Point 1 (R. 238). Later in his direct examination he was asked as to the relative strength of those rods as compared to the hanger plate at Point 2 to which objection was sustained as repetition (R. 239). In the colloquy which ensued he made some protest that it was not repetition (which was correct) and was summarily contradicted by the Court (R. 239) which could have no effect but to discredit the witness without warrant before the jury.

Petitioner contends that these rulings in themselves were reversible error constituting such departure from the accepted and usual course of judicial proceedings as to require reversal but in any event their cumulative effect in a case

where plaintiff's injuries inevitably excited pity and prejudice was such as to deny petitioner a fair trial. While we are not here dealing with a criminal case, a litigant in a civil case should not be deprived of its property without fair trial and the substantial effect of a series of such instances has been recognized in Berger vs. United States, 295 U. S. 78, 55 S. Ct. 629, 633 as follows:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare N. Y. Central R. R. Co. vs. Johnson, 279 U. S. 310, 316-318, 49 S. Ct. 300, 73 L. Ed. 706."

**(B) Argument of Counsel**

In the first instance respondent's counsel went outside of the record in commenting on the number of witnesses that respondent would have produced if an issue had been made whether he was drunk (R. 245, 350). Respondent had volunteered the information that he had had a small amount of wine and beer (R. 37-8, 55-6, 62, 94). This subject had had only casual mention on cross-examination (R. 44, 59). Counsel's statement that petitioner would have been "swamped" if it had attempted to prove that respondent was drunk (R. 245, 350) was wholly unsupported by the evidence at the trial and was improper. A witness at the trial would not be permitted to testify as to what other people would swear and it is clearly improper for counsel to make claims as to the testimony of numerous witnesses not identified, sworn nor produced.

Improper assertions of personal knowledge on the part of counsel, which is obviously not as harmful as assertions as to what numerous persons would testify, was condemned in Berger vs. United States, supra.

Next counsel argued petitioner's financial responsibility by inviting the jury to figure out the number of quarter sections of land and property in Turner County (R. 246, 350). This has been repeatedly held to be grounds for reversal. See cases cited in Annotation 78 A. L. R. 1452.

Later the argument was made that it was lucky for petitioner the accident did not happen when a school bus was going over the bridge (R. 346, 350-1). Speculating about the catastrophe that would be involved in the collapse of the bridge with a bus full of school children could have had no purpose but to inflame the jury and on no theory could bear upon any of the issues in the case except to place upon petitioner a duty far in excess of that required by statute.

And finally it was argued that it would be a good and salutary thing to give the people of South Dakota a lesson in this case (R. 246, 351). In numerous cases this is held to be grounds for reversal. See Annotation 78 A. L. R. 1479.

Appeals to passion and prejudice are condemned in New York Central Railway Co. vs. Johnson, 279 U. S. 310, 49 S. Ct. 300:

> "That the quoted remarks of respondent's counsel so plainly tended to excite prejudice as to be ground for reversal, is, we think, not open to argument. The judgments must be reversed, with instructions to grant a new trial.
>
> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. See Union Pac. R. Co. vs. Field (C. C. A.) 137 F. 14, 15; Brown vs. Swindford, 44 Wis. 282, 293 (28 Am. Rep. 582). Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. Brasfield vs. United States, 272 U. S. 448, 450. 47 S. Ct. 135 (71 L. Ed. 345).

> "As there must be a new trial, attention should be directed to other objectionable conduct by respondents' counsel in the course of the trial; their repeated assertion, without supporting evidence, that the defense was a 'claim agent defense'; references to petitioner as an 'eastern railroad'; and statements that the railroad had 'come into this town' and that witnesses and records had been 'sent on from New York' for the trial of the cause. Such remakes of counsel, and others of similar character, all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country have been so often condemned as an appeal to sectional or local prejudice as to require no comment. See Cherry Creek Nat. Bank vs. Fidelity & Casualty Co., supra; Dolph vs. Lake Shore, etc., R. Co., 149 Mich. 278, 280, 112 N. W. 981; Southern R. Co. vs. Simmons, 105 Va. 651, 665, 55 S. E. 459."

The instant case is not one in which counsel failed to object (Compare United States vs. Socony Vacuum Oil Company, 310 U. S. 150, 238-9, 60 S. Ct. 811, 851) but on the contrary objection was made specifically at the time.

The argument was condemned by the Court of Appeals: "We agree with counsel for the county that the remarks should not have been made. We think that counsel for plaintiff jeopardized his client's interests in making them" (R. 430-1). But the Court held that because the record did not contain the closing arguments of counsel for both parties, reversal could not be secured as a matter of right and intervention to protect the public interest in the orderly administration of justice was not required. Petitioner submits that particularly in a case of this type the argument was of such a character as to require the Court of Appeals on its own motion to protect petitioner and its right to a verdict uninfluenced by the appeals of counsel to passion and prejudice.

Its decision in this case is directly contrary to the principles which it has recognized in Kroger Grocery & Baking Co. vs. Stewart, 164 F. 2d 841, 844 as follows:

> "The attitude of this Court and of other federal appellate courts toward the interjection of irrelevant personalities and appeals to prejudice or passion in final argu-

ment, has been so clearly stated in many cases as to call for no further discussion. (Citing cases.) This Court, in the interest of an orderly administration of justice, will continue to do all that reasonably may be done to assure litigants that a trial in a District Court of the United States shall be so conducted that the verdict of the jury fairly may be assumed to be based upon an impartial consideration of the evidence and the applicable law."

The Court of Appeals decisions was based upon the rule which it had announced in London Guarantee and Accident Company vs. Woelfle, 83 F. 2d 325, 344, requiring the record to contain all arguments in full to secure a reversal because of improper remarks of counsel. This rule seems to be based in part upon the consideration that exceptions may then be taken at the close of the argument to save appellant the risk of injuring his client's case by interrupting; in part on local practice which had been in effect in Minnesota courts; and in part upon the view of the Court of Appeals that it would not reverse where improper argument might have been invited or provoked by argument of opposing counsel.

The last consideration is directly opposed to the rule announced in New York Central Railway Co. vs. Johnson, supra, as follows:

> "Want of good judgment or good taste, or even misconduct on the part of either, was not an issue in the case for the jury, nor could it excuse like conduct on the part of respondents' counsel. See Tucker vs. Henniker, 41 N. H. 317, 322; Mittleman vs. Bartikowsky, 283, Pa. 485, 488, 129 A. 566; Mitchum vs. State of Georgia, 11 Ga. 615, 629; Welch vs. Union Central Life Ins. Co., 117 Iowa, 394, 404, 90 N. W. 828. An exhibition of any or all of these faults was not ground for a verdict in respondents' favor or for enhancing it."

There is no record and no claim that the improper argument was invited or provoked by the argument of opposing counsel. In fact the character of the argument itself discloses that it was on subjects which on no conceivable theory would be discussed by petitioner's counsel.

As to the first mentioned consideration, in the instant case, as we have pointed out, prompt and specific objection was made.

The remaining consideration raises a question whether petitioner's counsel should be charged with the peculiar requirements of Minnesota practice simply by their announcement in the decision mentioned to deprive petitioner of a fair and impartial trial. No such requirement is contained in the Federal Rules of Civil Procedure on the matters to be included in the record under Rule 75 (g). On the contrary it is definitely contrary to Rule 46 which saves an exception in cases where the party makes known to the Court his objection and his grounds therefor.

The Court of Appeals by its rules effective May 24, 1947, some eleven years after the Woelfle decision in 1936 outlines in detail the contents required in the record, particularizing such things as the complete instructions of the trial court, the form in which the evidence shall be presented, translation of matters in foreign language, objections to evidence verbatim, etc. But there is no requirement that the record contain all arguments. See Rule 10 (b) United States Court of Appeals for the Eighth Circuit set forth in the appendix.

While it may be recognized that the applicable procedural law is that of the United States, in considering the efforts of petitioner's counsel to preserve error it may be noted that the South Dakota practice has long required affidavits to present misconduct of counsel. State vs. Degner, 59 S. D. 539, 241 N. W. 515. An affidavit was filed (R. 350).

Petitioner submits that the law of the United States as outlined in the Federal Rules of Civil Procedure and in the Rules of the Court of Appeals for the Eighth Circuit does not require that the record contain the arguments in full and that petitioner's right to a fair and impartial trial, which the public interest requires should not be denied because of technical procedural requirements having isolated mention in one or several of the great volume of decisions emanating from that Court of Appeals. The record, as presented, affirmatively shows that the verdict must have been influenced by the appeals to passion and prejudice.

## Point 4.

### Respondent May Not Recover on Evidence Contrary to the Physical Facts

It does not seem to be disputed that recovery cannot be based upon oral evidence which is opposed to the undisputed physical facts and this rule applies also when the evidence is based upon opinions of experts. See Buboltz vs. C. M. & St. P. Ry. Co., 47 S. D. 512, 199 N. W. 782; Polluck vs. M. & St. L. Ry. Co., 45 S. D. 210, 186 N W. 830; U. S. vs. Hill, 8 Cir., 62 F. 2d 1022, 1025; U. S. vs. Thornburgh, 8 Cir., 111 F. 2d 278, 280; Ocean Accident and Guarantee Corp. vs. Moore, 8 Cir., 85 F. 2d 369, 375 and Svenson vs. Mutual Life Insurance Company of New York, 8 Cir., 87 F. 2d 441, 445.

The Court of Appeals held that the oral evidence was not so clearly opposed to the undisputed physical facts as to require a verdict for petitioner (R. 425-6).

Petitioner's contention is based upon two propositions. As to both of these propositions, respondent's case is predicated upon the opinion of his experts that a hanger plate supporting the second floor beam from the east failed at what has been referred to as Point 2 permitting the floor beam to drop and the floor to sag so that his car was thrown out of control (R. 101-39).

Petitioner's experts have explained why the accident could not have occurred as respondent contends and while the reasons were given by these witnesses as experts, petitioner submits that the undisputed physical facts compel those conclusions as a simple matter of common knowledge.

In the first place respondent's theory assumes that the initial failure was at the south hanger plate at Point 2 which permitted the south end of the floor beam to drop. Visualizing the result of such an occurrence (R. 339) it is obvious that the dropping of this end of the beam would simply bend the lower portion of the opposite hanger plate outward and to the north. The undisputed physical facts show that precisely the opposite result occurred and the lower part of the hanger plate attached to the north end of the floor beam bent inward or to the south (R. 309).

The Court of Appeals held that the north hanger plate may first have been bent outwardly and afterwards have been inwardly by the subsequent movements of the bridge while it was falling (R. 426). To achieve that result it would be necessary for some swaying movement of the bridge to whip the 500 pound floor beam (R. 232) and a four to five ton weight of floor up in some fashion to cause reverse bending (R. 243-5). Petitioner submits that this result is impossible as a simple matter of common knowledge.

In the second place, the result claimed by respondent could not have occurred because of the condition of the floor itself which following the collapse of the bridge was straight, level, rigid and intact from Point 1 to Point 3 through Point 2 with the joists still solidly spiked at Point 2 where the failure is supposed to have occurred so that they had to be pried apart with a five foot crow bar and so that following the collapse and without any support at Point 2 a pick-up truck proceeded onto the part of the floor that was supposed to have dropped into a dip, and it was still rigid then (R. 159-60, 166, 168-9, 173-5). This demonstrates that the floor could not have gone into a sag or dip as respondent claims whether or not the hanger plate might have failed and the floor beam dropped, because in order to do so the joint at Point 2 would have had to separate which would necessarily loosen or tear out the spikes where the planks were lapped and spiked so the unsupported floor could no longer be straight and rigid.

It was the position of the Court of Appeals that the sagging or dipping of the 33 feet of flooring might not have been so great as to break the ends of the planks where they were lapped and spiked at Point 2 (R. 426). The evidence shows that the floor did not sag or dip with a comparable or greater weight afterwards and it is not contended that the result would require that the ends of the planks be broken. Petitioner does submit, however, that any dip or sag would either separate the ends of the planks or twist the spikes so that the floor would remain or drop into the same sort of dip or sag and that simply did not occur.

The Court of Appeals suggests: "We think that if any substantial error was committed in this case it was an error of

fact attributable to the jury with which this court may not concern itself" (R. 432).

Petitioner contends that not only do the physical facts compel the direction of verdict in its favor but they demonstrate that substantial error was committed. We believe it to be error of law. If it is error of fact attributable to the jury, that is because its verdict was not the result of a fair and impartial trial with which the Court of Appeals should in the accepted and usual course of judicial proceedings have concerned itself and its failure to do so is such as to call for an exercise of this Court's power of supervision.

Because of the conflict with applicable local decisions and the departure from the accepted and usual course of judicial proceedings it is respectfully submitted that the decision should be reviewed on writ of certiorari and reversed.

T. M. BAILEY,
M. T. WOODS,
H. L. FULLER,
Sioux Falls, South Dakota.
L. L. MADSEN,
Parker, South Dakota,
*Counsel for Petitioner.*

# APPENDIX

## Statutes Cited

### South Dakota Code of 1939

28.0304 *County Highway superintendent.* The board of county commissioners at its discretion may annually employ a county highway superintendent the salary and expenses to be fixed and allowed by the board of county commissioners, to be paid out of the motor vehicle fund of the county. No member of the board of county commissioners shall be appointed as county highway superintendent. The tenure of office of the county highway superintendent may be terminated at any time by resolution of the board of county commissioners upon thirty days notice.

The county highway superintendent shall have charge of all road construction and maintenance in the county, subject to the approval of the board of county commissioners. In case of a disagreement between the county superintendent of highways and the board of county commissioners an appeal may be taken to the Commission, whose decision shall be final.

The county highway superintendent shall keep a detailed record of the cost of any work on any section of the highway, bridge, tile, or culvert construction, repair work, or materials therefor done under his supervision by the county, by day labor and shall immediately upon the completion of each piece of work file such record with the county auditor, showing in detail the cost of all labor, materials, repairs, repair materials, hauling, inspection costs, and a proper proportion of the yearly equipment depreciation and repair charges for the county road building equipment, rental of machinery and every other item of cost, and shall prepare and file with the county auditor not later than the fifth of January of each year a true and correct inventory of all road building equipment, supplies, and materials on hand together with his estimate of its present value.

The county highway superintendent shall be provided with a suitable office by the county and shall file a bond to the county for the faithful performance of his duties in a sum not less than two thousand dollars nor more than five

thousand dollars to be fixed by resolution by the board of county commissioners.

28.0312 *Duty to maintain county highway system: board of county commissioners; county highway superintendent; machines.* It shall be the duty of the board of county commissioners to maintain properly and adequately the county highway system within the county by contract or day labor on all or different portions of the same as the board of county commissioners may deem most expedient, and to maintain any secondary highways according to any agreement made by it in consideration of federal aid received for construction and improvement of such highways.

The board of county commissioners is hereby empowered to purchase drags, road planers, tractors, and other approved mechanical devices to maintain properly the county highway system.

The county highway superintendent is hereby charged with the actual direction and supervision of all maintenance work in the county and shall keep a record of the costs of such work and certify to the correctness of all claims for such work, except for the purchase of machinery.

Payment for maintenance work shall be made on warrants drawn upon the county road fund or county motor vehicle fund.

28.0913 *Defective highways, bridge, culverts: duty of county, township, or municipality to guard and repair; action for damages by person injured.* In case any highway culvert, or bridge shall become in whole or in part destroyed or out of repair by reason of floods, fires, or other cause to such an extent as to endanger the safety of public travel, it shall be the duty of the governing body or board under statutory duty to maintain such highway, culvert, or bridge upon receiving notice thereof to cause to be erected for the protection of travel and public safety, within twenty-four hours thereafter, substantial guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and to repair the same within a reasonable time thereafter. It shall also be the duty of such governing body or board to guard any abandoned public highway, culvert, or bridge in like manner.

Any person who shall sustain injury to person or property by reason of any violation of this section shall have a cause of action against the county, township, city, or town as the case may be for such damages as he may have sustained.

28.1402 *Construction and maintenance.* The duty to construct and maintain all bridges and culverts throughout the county, except upon the State Trunk Highway System, is hereby imposed upon the board of county commissioners, subject to sections relating to culverts on secondary highways in townships.

28.1412 *Guard rails on bridges and culverts.* It shall be the duty of the board of county commissioners or the board of township supervisors, as the case may be, to cause to be built and maintained substantial guard rails, not less than thirty-six inches high, upon and along the sides of all county and township bridges and culverts that are six feet or more in length, such guard rails to be paid for out of the county or township bridge fund.

28.1414 *Continued inspection of bridges.* It shall be the duty of the county highway superintendent at reasonable intervals to make a thorough inspection of each and every existing bridge in the county. Such inspection shall consist of a thorough examination of the whole structure for any conditions affecting the life and safety of the bridge such as faulty design, neglect of maintenance, excessive loading, development of cracks, conditions of footing, etc. The county highway superintendent shall make a report of the conditions of each such bridge as he finds it, together with recommendation for repairs, stating the date of inspection, and shall cause the same to be filed in the office of the county auditor who shall refer the matter to the board of county commissioners at their next regular or special meeting.

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## Rules, United States Court of Appeals, Eighth Circuit

### Rule 10. Printing of Record

(b) *Contents of Printed Record.* The printed record shall contain all of the essential pleadings, essential docket entries, the judgment or order appealed from or sought to be

reviewed or enforced, and the opinion, findings and conclusions of the trial court or administrative agency, and, if the case was tried to a jury, the complete instructions of the trial court and the verdict. The printed record shall also contain so much of the evidence, either in narrative or question and answer form, as may be necessary to enable this court to determine the questions presented for decision. If the printed record contains any matter in a foreign language, it must be accompanied by a correct translation thereof. If the appellant or petitioner in his brief challenges rulings upon evidence, such evidence, the objections interposed thereto, and the rulings questioned shall be quoted in the printed record, and if the question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment of the court or board is raised by the appellant or petitioner, he shall include in the printed record all evidence received upon the trial or hearing pertinent to that question.

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1948

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No. 541

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TURNER COUNTY, SOUTH DAKOTA
*Petitioner*
vs.
FLOYD MILLER
*Respondent*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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## PRELIMINARY STATEMENT

Petitioner seems to misapprehend the function of certiorari in this Court.

It is settled that certiorari is granted only when it is desirable in the public interest, and that the writ is not issued to review fact questions.

Rule 38, Paragraph 5 of Rules of this Court, effective February 27, 1939; *Magnum Import Co. v. Coty*, 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922; *Layne & Bowler Corporation v. Western Well Works*, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273.

We shall, therefore, ignore Petitioner's argument to the effect the evidence herein did not sustain the judgment, and deal only with Petitioner's contentions that the Court of Appeals decision is in conflict with South Dakota Supreme Court decisions, and that there has been such a departure from the usual course of judicial procedure as to require correction from this Court.

These will be treated under appropriate subheadings. "R" in parentheses followed by an Arabic numeral will denote the page of the record to which reference is made.

## ALLEGED CONFLICT

As appears from the opinion of the Court of Appeals (R 414-432), that Court followed *Clementson v. Union County*, 63 S. D. 104, 256 N. W. 794 as establishing the basic principles on which Petitioner's liability was predicated.

The gist of Petitioner's contention is that the *Clementson* case has been so modified by *Reaney v. Union County*, 69 S. D. 302, 10 N. W. (2d) 762 (opinion adhered to on rehearing 69 S. D. 488, 12 N. W. (2d) 14) and *Williams v. Wessington Township*, 70 S. D. 75, 14 N. W. (2d) 493, as to be no longer applicable to vital questions here involved.

Specifically, Petitioner asserts that contrary to the *Clementson* case, the *Reaney* and *Williams* cases made it immaterial whether or not Petitioner kept the bridge in question in proper repair, and that there would be no liability unless there was actual, as distinguished from constructive notice of the allegedly dangerous condition.

In so contending, Petitioner tries to read into the *Reaney* and *Williams* cases things which simply are not there.

By comparison of the *Clementson* and *Reaney* cases it will be found that all the *Reaney* case holds is that due to a change in the applicable statute, a county is no longer liable for injuries resulting from a highway or bridge defect which is inherent in the original construction. There is not even a hint that liability may not be based on failure to keep the structure in proper repair. The controlling statute, Section 28.0913 of the South Dakota Code of 1939, printed at Pages 38-39 of Petitioner's brief, makes it manifest no court could

reach the conclusion asserted by Petitiiner. The statute is that if a "bridge shall become . . . out of repair . . . to such an extent as to endanger the safety of public travel," liability exists for any resulting injury if barricades are not placed within twenty-four hours after "notice" to the governing body under statutory duty of maintenance.

Whether the notice required must be actual, or whether it may be constructive, was decided by the *Clementson* case, wherein it was held constructive notice is sufficient. There is no suggestion in the *Williams* case that this is overruled. On the contrary, the *Williams* case cites the *Clementson* case with apparent approval, and discusses what circumstances are sufficient to show constructive notice. All that the *Williams* case holds is that the governing body has twenty-four hours after notice in which to act, and that there can be no liability for failure to act earlier.

On the question whether constructive notice was shown, the trial court and Court of Appeals followed the well established rule, supported by South Dakota and other decisions, to the effect that the governing board of a public corporation charged with the duty of maintaining a public way, has constructive notice of any defect which would have been discovered if such duty had been adequately performed by such governing body and its subordinate officers and employees. *Gellenbeck v. City of Mobridge*, 40 S. D. 157, 166 N. W. 631; *Smith v. City of Yankton*, 23 S. D. 352, 121 N. W. 848; *Schuler v. City of Mobridge*, 44 S. D. 488, 184 N. W. 281; *District of Columbia v. Woodbury*, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed. 472; *Handy v. Meridian Township*, 114 Mich. 454, 72 N. W. 251; *Moore v. Kenockee Township*, 75 Mich. 332, 42 N. W. 944; *Johnson v. Iron River*, 149 Wis. 139, 135 N. W. 522; *Thomas v. City of Flint*, 123 Mich. 10, 81 N. W. 936; *Waud v. Polk County*, 88 Iowa 617, 55 N. W. 528.

It is clear the Court of Appeals applied the local law as such local law has been enunciated by the South Dakota Supreme Court. The conflict asserted by Petitioner is fanciful, not real.

## ALLEGED DEPARTURE FROM USUAL COURSE OF JUDICIAL PROCEEDINGS

Petitioner's contentions in this respect are also unsubstantial. So far as concerns the alleged misconduct of Respondent's counsel, Petitioner simply failed to follow the well established rule for preservation of this question for review as a matter of right.

More than twelve years ago — on April 20, 1936 — the Court of Appeals for the Eighth Circuit, in *London Guarantee & Accident Co. v. Woelfle,* 83 F. (2d) 325, 344 announced:

> "In the future, to secure from this court, as a matter of right, a reversal of a judgment because of improper remarks of counsel in an argument made to a jury, *the bill of exceptions must contain all arguments in full* and must show, either that adequate objections and exceptions to rulings thereon were taken during the argument complained of, or that such remarks were specifically excepted to at the close of the argument. While failure of a party to take proper exceptions will not deprive this court of its power to grant a new trial in the public interest, we think there is no reason why that power should be exercised in such a case except under th most unusual circumstances." (Emphasis supplied.)

The rule has frequently been reiterated since then, the last time as late as October 27, 1947.

*Chicago & N. W. R. Co. v. Kelly,* 84 F. (2d) 569, 575; *Thomson v. Boles,* 123 F. (2d) 487, 496; *Gantz v. United States,* 127 F. (2d) 498, 504; *Palmer v. Miller,* 145 F. (2d) 926, 931; *Chicago & N. W. R. Co. v. Green,* 164 F. (2d) 55, 64; *Fleming v. Husted,* 164 F. (2d) 65, 68.

There was, accordingly, no excuse for failure to follow this rule on the part of any litigant who felt he had for presentation any such question that really warranted appellate attention.

The same practice exists in the Tenth Circuit. *Pietch v. United States,* 110 F. (2d) 817, certiorari denied 310 U. S. 648, 60 S. Ct. 1100, 84 L. Ed. 1414; *Metropolitan Life Ins.*

*Co. v. Banson,* 106 F. (2d) 561. This is also true in the Second Circuit. *Vause v. United States,* 53 F. (2d) 346, 354, and *United States v. Dilliard,* 101 F. (2d) 829, 837.

That such procedural rule is sound is nicely illustrated by *United States v. Socony Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129. There this Court held that certain statements of counsel, standing by themselves, appeared "highly improper," but that "a reading of the entire argument before the jury leads to the firm conviction that the comments which respondents now rely on for their assertions of error were isolated, casual episodes in a long summation of over 200 printed pages and not at all reflective of the quality of the argument as a whole."

The alleged misconduct (R 245-246) was obviously of such character that whether or not there was impropriety, and if so, whether it was prejudicial, would be dependent on the entire context of the arguments made, just as it did in the *Socony Vacuum Oil* case.

So far as concerns the claimed restriction of cross-examination, the record speaks largely for itself. Petitioner was allowed wide latitude, of cross-examining and recross-examining witnesses, to the extent of much repetition. (R 44-53, 59-62, 65-67.)

On analysis most of Petitioner's complaints in this respect are trivial.

One is because the trial court sustained an objection when Plaintiff was asked on cross-examination if his tires would leave skid marks on the bridge without the brakes applied. It was in the record without dispute that the weather was frosty, such as to leave tire marks visible (R 18). Obviously the question called for speculation and conclusion.

Another complaint is that Petitioner was not permitted to cross-examine as to an alleged discrepancy in Respondent's testimony as to the distance a car was behind him. The only basis for any estimate was the reflection in Respondent's windshield of the lights of the car in the rear (R 47). Obviously any estimate would be a guess, and the trial court was within its discretion in holding any such minor discrepancy had no tendency to show untruthfulness or unreliability.

Another complaint reduces itself to a quibble on nomenclature. In his trial testimony Respondent told of a bump as the bridge went down under him (R 39), while in a pre-trial examination he did not speak specifically of a bump, but of feeling "the drop" (R 47-48), which would necessarily include a bump. The trial court held this was not such a discrepancy as could be used as impeachment.

The complaint by Petitioner commencing at the middle of Page 24 of its brief reduces itself to nothing whatever. After considerable contention as to the state of the record, Petitioner was permitted to introduce the impeaching testimony offered (R 51). The same is true as to the complaint in the paragraph commencing at the bottom of Page 24 of its brief (R 69).

As to the complaint made by Petitioner in the two paragraphs in the middle of Page 25 of Petitioner's brief, reference to the record will show the attempted cross-examination unfair. The witness, Willard Miller, had testified on cross-examination that the bridge floor did not *at all times* look flat ahead as if he could have driven right across (R 69). Impeachment was attempted on a portion of the pre-trial statement wherein the witness said that "at that time," obviously referring to when he went onto the bridge, the floor looked flat ahead and as if he could have driven right across (R 69).

As to the complaint on Page 27 of Petitioner's brief as to restriction of the cross-examination of Respondent's witness McWayne, all that this involves is that the trial court would not permit a question as to whether a specified part from the wrecked bridge was in a certain yard, when the witness had already been cross-examined as to this, and the question represent mere repetition. (Compare R 139 with R 140.)

The alleged misconduct of the trial court was as to a statement made while Petitioner's expert witness Giertsen was on the stand. Mr. Giertsen was asked as to the relative strength of the hip rods in the hanger plates at what had been referred to as Point 1 and Point 2 (R 239). After answering that it was "about one to three," he then went on to repeat what he had previously testified (R 238), which was that hip rods

were the weakest point in the structure, and that the rods were three-quarters of an inch in diameter. Respondent objected that this was repetition, and the court sustained the objection. The witness then interjected, "I don't think it is," with the court responding "I said it was." (R 239.) The court's ruling was correct, and if trial decorum is to be preserved, witnesses may not be permitted to argue with the judge.

There is nothing here at all comparable to any case in which this court has granted certiorari on the ground alleged. Petitioner relies on *Alford v. United States,* 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624; *District of Columbia v. Clawans,* 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843; *New York Central Ry. Co. v. Johnson,* 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706; and *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314.

In the *Clawans* and *Berger* cases certiorari was granted on other grounds. On the resulting review, error was held to have been committed in each case for flagrant infringement on the rights of a person on trial for alleged crime.

The *Alford* case, also criminal, disclosed a complete shutting-off of all right of cross-examination on a matter vital to the defense.

In the *Johnson* case defense counsel in a personal injury suit had asked questions which sought to develop whether the claimed disability was from syphilis, rather than from the accident. Counsel for the plaintiff made to the jury a highly inflammatory address, charging defense counsel with besmirching the plaintiff, with misstatements to the effect that the alleged syphilis was the defense, et cetera.

It is clear that in this case the Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for exercise of this Court's power of supervision. Petitioner's contentions in this respect are a pretext rather than a reason for certiorari.

## CONCLUSION

All that here appears is that Petitioner wants still further appellate review. Petitioner has shown nothing to indicate that the public interest requires such further review.

Whether or not Petitioner was liable to Respondent depends entirely on local law. This is solely for the Legislature and the courts of South Dakota to determine. The Court of Appeals followed the law as locally established. As to the alleged misconduct of the trial court and Respondent's counsel, and alleged restriction of cross-examination, the most that can be said is that those questions were such as were proper for appellate review, and such review has been had.

Respectfully submitted,

HOLTON DAVENPORT,
ELLSWORTH E. EVANS,
LOUIS R. HURWITZ,
ROY E. WILLY,

Sioux Falls, South Dakota,

*Attorneys for Respondent.*